



PUBLIC NOTICE

Federal Communications Commission
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DA 11-594
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CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON:

THE JOINT PETITION FILED BY DISH NETWORK, LLC, THE UNITED STATES OF AMERICA, and THE STATES OF CALIFORNIA, ILLINOIS, NORTH CAROLINA, AND OHIO FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) RULES

AND

THE PETITION FILED BY PHILIP J. CHARVAT FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) RULES

AND

THE PETITION FILED BY DISH NETWORK, LLC FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) RULES

PLEADING CYCLE ESTABLISHED

CG Docket No. 11-50

Comment Date: May 4, 2011

Reply Comment Date: May 19, 2011

The Federal Communications Commission (Commission or FCC) has before it three petitions for declaratory ruling raising similar issues concerning the Telephone Consumer Protection Act of 1991 (TCPA).¹ The petitions arise from two pending federal court lawsuits filed under the TCPA. In this public notice, we seek comment on the petitions.

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

The Joint Petition. On February 22, 2011, a joint petition was filed by DISH Network, LLC (DISH), the United States, and the States of California, Illinois, North Carolina, and Ohio (the States)² requesting expedited clarification of and declaratory ruling on the TCPA and the Commission's related rules. Both DISH and the States present questions related to TCPA liability for companies when third-party retailers make unlawful telemarketing calls.³ The parties filed the *Joint Petition* in response to an order of the federal district court in which their litigation under the TCPA is pending.⁴

The Charvat and DISH Petitions. On March 2, 2011, Philip J. Charvat (Charvat) filed a petition requesting a declaratory ruling involving issues similar to those raised by the *Joint Petition*.⁵ On March 10, 2011, DISH filed a petition seeking similar clarification.⁶ The parties filed these petitions in response to an order of the United States Court of Appeals for the Sixth Circuit referring to the FCC issues arising from their federal court litigation under the TCPA.⁷ Specifically, the parties request that the Commission interpret the do-not-call and prerecorded voice call provisions of the TCPA and the Commission's implementing regulations to determine whether they create liability for a person or entity by virtue of telephone calls made by a third-party retailer.

Issues presented by the petitions. The TCPA, in relevant part, provides that it is unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted [by FCC rule or order]..."⁸ In addition, pursuant to the TCPA, the FCC's rules provide for both a national Do-Not-Call Registry and company-specific do-not-call lists that protect consumers from unwanted telephone solicitations.⁹

The TCPA provides a private right of action to remedy violations of these provisions of the TCPA or the FCC's related rules.¹⁰ The TCPA also provides that a state can bring suit on behalf of its residents concerning such violations.¹¹

DISH, in its portion of the *Joint Petition* and later in its independent filing, asks the Commission to declare that the TCPA does not impose liability on a company for telemarketing calls made by third-

² Petition for Declaratory Ruling, filed by DISH Network, LLC, the United States, and the States of California, Illinois, North Carolina, and Ohio, February 22, 2011 (*Joint Petition*).

³ *Joint Petition* at 10-18, 20-26.

⁴ See *United States et al. v. DISH Network, LLC*, Case No. 09 cv 3073-MPM-BGC, Order (E.D.Ill. February 4, 2011) (directing the parties to seek FCC guidance under the doctrine of primary jurisdiction).

⁵ Petition for Declaratory Ruling, filed by Philip J. Charvat, March 2, 2011 (*Charvat Petition*).

⁶ Petition for Declaratory Ruling, filed by DISH Network, LLC, March 10, 2011 (*DISH Petition*).

⁷ See *Charvat v. EchoStar Satellite L.L.C.*, C.A. No. 09-4525, Order, 2010 U.S. App. LEXIS 26404 (6th Cir. Dec. 28, 2010).

⁸ 47 U.S.C. § 227(b)(1)(B); see also 47 C.F.R. § 64.1200(a)(2).

⁹ 47 U.S.C. § 227(c); see also 47 C.F.R. § 64.1200(c).

¹⁰ See 47 U.S.C. §§ 227(b)(3), (c)(5).

¹¹ See 47 U.S.C. § 227(f).

party retailers that allegedly violate section 227(b)(1)(B).¹² To support its request, DISH relies exclusively on the private right of action language provided in section 227(b)(3) to redress violations of the prerecorded call restrictions.¹³ This section allows a person or entity to bring an action in state court to enjoin the violation and recover monetary damages.¹⁴ If the Commission determines that liability for unlawful prerecorded calls made by third-party retailers attaches to a company contracting with the retailers, DISH argues that such liability should be either based on the call being made at the “direction and request” of the company at issue¹⁵ or based on federal common law principles of agency.¹⁶

In its petition, Charvat requests that the Commission clarify that a company on whose behalf a telephone solicitation is made bears the responsibility for any TCPA rule violation incurred by the party acting on the company’s behalf.¹⁷ To support his request, Charvat relies on the private right of action language provided in section 227(c)(5) and applies it to violations of prerecorded call restrictions.¹⁸ This section allows a person who has received more than one call within a 12-month period “by or on behalf of” the same entity in violation of the TCPA’s do-not-call provisions to bring an action in state court.¹⁹ Charvat suggests that the plain meaning of the phrase “on behalf of” should determine whether third-party retailers can be held liable for unlawful calls.²⁰ If the Commission determines liability for unlawful prerecorded calls made by third-party retailers does not attach to a company contracting with the retailers, Charvat argues that such liability should be determined based on federal common law principles of agency and joint venture law.²¹

Finally, the United States and the States ask the Commission to declare that an entity on whose behalf a third party solicits the sale of the entity’s goods or services is liable for TCPA violations committed by that third party.²² To bolster its request, the United States and the States rely on the actions by states language provided in section 227(f). This section permits a state’s attorney general to bring an action against any person who has engaged or is engaging in a pattern or practice of telephone calls that violate the TCPA.²³ To resolve assignment of liability, the States also rely on the “on behalf of” language in section 227(c)(5), the do-not-call private right of action provision, and apply it to violations of prerecorded call restrictions.²⁴

¹² *Joint Petition* at 10-18; *DISH Petition* at 4-9.

¹³ *DISH Petition* at 4-9.

¹⁴ 47 U.S.C. § 227(b)(3).

¹⁵ *DISH Petition* at 13-15.

¹⁶ *Joint Petition* at 16-17; *DISH Petition* at 15-16.

¹⁷ *Charvat Petition* at 8-10.

¹⁸ *Id.* at 8-13.

¹⁹ 47 U.S.C. § 227(c)(5).

²⁰ *Charvat Petition* at 12-13.

²¹ *Id.* at 14-16.

²² *Joint Petition* at 20-21, 24-26.

²³ *Id.* at 23-26.

²⁴ *Id.*

Comments sought. In light of these petitions, we seek comment on the circumstances under which a person or entity is liable for telemarketing violations committed by dealers or other third parties that act on the person's or entity's behalf. In particular, we ask for comments regarding the following questions:

- 1) Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (*i.e.*, physically place the call)?
- 2) What should determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define "on behalf of" liability for a seller under the TCPA?

Additionally, we solicit comments addressing the applicability of federal agency law and federal joint venture law to the TCPA liability questions presented herein.

All comments should refer to CG Docket No. 11-50. Further, we strongly encourage parties to develop responses to this Notice that adhere to the organization and structure of the questions in this Notice.

Comments may be filed using (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. Comments can be filed through the Commission's ECFS filing interface located at the following Internet address: <http://www.fcc.gov/cgb/ecfs/>. Comments can also be filed via the Federal eRulemaking Portal: <http://www.regulations.gov>.²⁵ Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case CG Docket No. 11-50. Parties who choose to file by paper must file an original and two copies of each filing.

For paper copies, filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

²⁵ Filers should follow the instructions provided on the Federal eRulemaking Portal website for submitting comments.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530, (202) 418-0432 (TTY).

This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁶ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.²⁷ Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.²⁸

For further information about this Public Notice, please contact Karen Johnson at (202) 418-7706 or Karen.Johnson@fcc.gov.

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²⁶ See 47 C.F.R. §§ 1.1200, 1.1206.

²⁷ See 47 C.F.R. § 1.1206(b).

²⁸ *Id.*